

Richard E. Gardiner (Pro Hac Vice to be submitted)
Attorney at Law
DAN M. PETERSON PLLC
Dan M. Peterson (Pro Hac Vice to be submitted)
3925 Chain Bridge Road, Suite 403
Fairfax, VA 22030
Tel: (703) 352-7276
Fax: (703) 359-0938
Email: regardiner@cox.net
Email: dan@danpetersonlaw.com

-and-

PARSONS, BEHLE & LATIMER
Robert W. DeLong, NV Bar No. 10022
50 W. Liberty Street, Suite 750
Reno, Nevada 89501
Tel: (775) 323-1601
Fax: (775) 348-7250
Email: rdelong@parsonsbehle.com

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RIGHTHAVEN, LLC,

Plaintiff,

v.

VIRGINIA CITIZENS DEFENSE
LEAGUE, INC., PHILLIP VAN
CLEAVE, AND JIM SNYDER,

Defendants.

Case No. 2:10-CV-01683-GMN-PAL

DEFENDANTS' MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. RULES 12(b)(2) and 12(b)(6)

Defendants Virginia Citizens Defense League, Inc. ("VCDL"), Philip Van Cleave, and Jim Snyder, by and through their undersigned counsel, hereby move this honorable Court, pursuant to Fed. R. Civ. P. Rules 12(b)(2) and 12(b)(6), to dismiss the Complaint filed against them by Plaintiff Righthaven LLC. The case must be dismissed as to all Defendants due to lack

1 of personal jurisdiction and failure to state a claim on which relief can be granted.

2 The reasons in support of this motion are set forth in the following Statement of Points
3 and Authorities in Support of Defendants' Motion to Dismiss.

4 **STATEMENT OF POINTS AND AUTHORITIES**
5 **IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

6 **FACTS**

7 This is an action for alleged copyright infringement.¹ The Complaint alleges that VCDL,
8 its President (Philip Van Cleave), and Vice-President (Jim Snyder), reproduced, distributed, and
9 "willfully engaged" in copyright infringement of a short news article that originally appeared on
10 the Las Vegas Review Journal website. Cplt. ¶¶ 36, 38, 40-42; Cplt. Ex. 1. The article related to
11 a successful businessman, West Point graduate, and military veteran who had a permit to carry a
12 concealed handgun, and was shot and killed by police while exiting a Costco store. Cplt. Ex. 1.
13 Plaintiff Righthaven LLC alleges that it holds the copyright to this article, such rights having been
14 transferred to it from the original owner. Cplt. ¶¶ 24, 26; Cplt. Ex. 3. Righthaven is an entity
15 engaged in acquiring copyrights to articles, in large part from the Las Vegas Review Journal, and
16 then suing people for alleged infringement. It has sued Defendants because of the alleged
17 unauthorized posting of the article on the website "vcdl.org." Cplt. ¶¶ 5, 7, 9.

18
19
20 ///

21 ///

22
23 ¹ The facts recounted herein are from the Complaint or attachments to the Complaint, from
24 matters of public record of which the Court can take judicial notice pursuant to Fed. R. Evid. 201,
25 or from the Declarations of Philip Van Cleave and Jim Snyder filed herewith. The Declarations
26 contain statements of fact related to personal jurisdiction, which may be included by affidavit or
27 declaration in support of a motion to dismiss for lack of personal jurisdiction pursuant to Fed. R.
28 Civ. P. 12(b)(2). *Scott v. Breeland*, 792 F.2d 925 (9th Cir. 1986). Defendants do not request that
the Court consider matters outside the pleadings and jurisdictional documents for purposes of the
Rule 12(b)(6) motion to dismiss for failure to state a claim on which relief can be granted, and do
not consent to turning the Rule 12(b)(6) motion into a motion for summary judgment. Should the
instant motions be denied, Defendants may file a separate motion for summary judgment on
issues addressed by the 12(b)(6) motion and possibly other issues.

1 The Complaint alleges that VCDL is a “Virginia domestic corporation.” Cplt. ¶ 4. VCDL
 2 is, in fact, a Virginia domestic nonstock (*i.e.* nonprofit) corporation that is tax exempt as a
 3 charitable and educational social welfare organization under § 501(c)(4) of the Internal Revenue
 4 Code.² As described by the President of VCDL, the Virginia Citizens Defense League “is a non-
 5 profit, non-partisan, grassroots organization dedicated to advancing the fundamental human rights
 6 of all *Virginians* to keep and bear arms as guaranteed by the Second Amendment to the United
 7 States Constitution and Art. I. Section 13 of the Constitution of the Commonwealth of *Virginia*.”
 8 (emphasis added). *See* Exhibit A, Declaration of Philip Van Cleave ¶ 2 (“Van Cleave Decl.”).

10 VCDL has no contacts with Nevada. According to the Van Cleave Decl. ¶ 5:

11 VCDL has no members in Nevada. It conducts no business in
 12 Nevada, is not qualified to do business in Nevada, has no officers or
 13 employees resident in Nevada, has no registered agent in Nevada,
 14 and has conducted no transactions of which I am aware in Nevada.
 It has no offices or property in Nevada. It has no bank accounts,
 contracts, or other financial interests in that state.

15 Instead, almost all members of VCDL are residents of Virginia. Van Cleave Decl. ¶ 6.
 16 VCDL’s grassroots activities are limited almost exclusively to Virginia, with occasional activities
 17 in adjoining jurisdictions such as D.C. and/or Maryland. *Id.* It conducts no activities specifically
 18 aimed at or targeted toward Nevada. *Id.*

19 Neither Mr. Van Cleave nor Mr. Snyder resides in Nevada. Both are residents of Virginia
 20 and have been for many years. Van Cleave Decl. ¶ 10; *see* Exhibit B, Declaration of Jim Snyder
 21 ¶ 4 (“Snyder Decl.”). Neither of them conducts any business or transactions in Nevada. *Id.*
 22 Neither of them has any real or personal property, bank accounts, financial interests, agents,
 23

24
 25 ² Section 501(c)(4) organizations include “Civic leagues or organizations not organized for profit
 26 but operated exclusively for the promotion of social welfare, ...and the net earnings of which are
 27 devoted exclusively to charitable, educational, or recreational purposes.” 26 U.S.C. § 501(c)(4).
 28 The educational and civic purposes of VCDL, consistent with its § 501(c)(4) status, are set forth
 in Article II of the certified copy of its Amended and Restated Articles of Incorporation which is
 included as Attachment 1 to the Van Cleave Declaration (Exhibit A). A true copy of the letter
 from the Internal Revenue Service recognizing VCDL as a 501(c)(4) organization is included as
 Attachment 2 to the Van Cleave Declaration (Exhibit A).

1 contracts, or other contacts with Nevada. They have infrequently traveled to or through Nevada
2 for recreational purposes unrelated to VCDL or this lawsuit. Van Cleave Decl. ¶ 10; Snyder
3 Decl. ¶ 4. In short, these two individuals have no pertinent contacts with Nevada whatsoever.

4 According to the Complaint, Mr. Van Cleave reproduced an “unauthorized copy” of a
5 “Righthaven owned” “literary” work entitled “Slaying of Army veteran shocks friends.” Cplt. ¶
6 9. This was an article that appeared on the Las Vegas Review Journal’s website on or about July
7 12, 2010. Cplt. ¶¶ 12, 25; Cplt. Ex. 1. The Complaint states that Mr. Van Cleave “posted said
8 unauthorized copy” on a website known as “vcdl.org” on or about July 22, 2010. Cplt. ¶¶ 5, 9,
9 14. It is alleged that “Defendants” displayed this “infringement” on “vcdl.org,” which the
10 Complaint refers to as “the Website.” Cplt. ¶¶ 5, 7, 14. The posting complained of (*see* Cplt. Ex.
11 2) expressly states at the outset that another individual emailed the article to Mr. Van Cleave.

12 Mr. Van Cleave confirms in his declaration that a link to the article was emailed to him by
13 a VCDL member who thought the article was germane to VCDL’s goals. Van Cleave Decl. ¶ 8.
14 Mr. Van Cleave did not copy the article from the website of the Las Vegas Review Journal or
15 from any other Nevada source. Van Cleave Decl. ¶ 9. Upon reading the article, he thought that it
16 was something that would be educational for VCDL’s members. Van Cleave Decl. ¶ 9.
17 Accordingly, he forwarded the email internally and the article was ultimately included in the
18 materials contained in Exhibit 2 to the Complaint in this case. Van Cleave Decl. ¶ 9.

19 As noted by Mr. Van Cleave, the materials contained in Exhibit 2 to the Complaint were
20 compiled for purposes of educating VCDL members in the Commonwealth of Virginia regarding
21 subjects of interest to those who own firearms and may carry firearms legally. Van Cleave Decl.
22 ¶ 7. These materials were not directed toward any individuals or corporations in Nevada, or
23 toward Nevada as a state. Van Cleave Decl. ¶ 7. Two links back to the Las Vegas Review
24 Journal’s website were provided. Cplt. Ex. 2.

1 Mr. Snyder also did not personally post the article on vcdl.org, and did not direct any
2 other individual to do so. To the best of his recollection, he took no action regarding this article
3 and was unaware of it until after this lawsuit was filed. Snyder Decl. ¶ 3.

4 The copy of the article posted on the Review Journal's website contained several
5 "buttons" at the top of the article on which the reader could click. Cplt. Ex. 1. One button
6 invites the reader to "save this" (that is, make an electronic copy) of the article. Another invites
7 the reader to "email this" article to other people. At the top, there are also two separate buttons
8 inviting viewers to print the article (that is, make a hard copy of it). At the bottom of the
9 webpage, there are additional buttons which again invite readers to "email this," "save this," and
10 "click to print." *Id.*

11
12 In this case, the news report at issue was published on July 12, 2010, and the alleged
13 infringing post on the Website is said to have occurred on July 22, 2010. Cplt. ¶¶ 25, 27.
14 According to the Complaint, Righthaven submitted its application to register the news report to
15 the U.S. Copyright Office on September 9, 2010. Cplt. ¶ 26. Righthaven does not allege in the
16 Complaint that it owned the copyright on or about July 22, 2010, or that it acquired rights to sue
17 for alleged infringements that occurred prior to September 9, 2010.

18
19 Righthaven is an entity that, according to this court's docket, has filed at least 172
20 lawsuits in this district in the past eight months alleging copyright infringement, generally
21 relating to news reports appearing in the Las Vegas Review Journal. A printout from the Court's
22 ECF docket is attached as Exhibit C, and Defendants request that the Court take judicial notice of
23 it.³ The vast majority of these suits are against non-Nevada defendants, for whom litigation in
24 Nevada is inconvenient and expensive. Many of these suits, as shown by the court's docket,
25
26

27
28 ³Courts can take notice of their own docket entries. *Griffin v. United States*, 109 F.3d 1217, 1218 n.1 (7th Cir. 1997)
(citing cases).

1 settle and are dismissed within a short period after filing, presumably by defendants who will pay
 2 money to avoid the cost of litigation in a distant forum. Exhibit C.

3 Additional facts will be discussed as relevant to the arguments below.

4 ARGUMENT

5 **I. THIS CASE MUST BE DISMISSED FOR LACK OF PERSONAL** 6 **JURISDICTION.**

7 It is well established that, in connection with a Rule 12(b)(2) motion, the defendant may
 8 file declarations or affidavits for the purpose of showing that the court lacks jurisdiction. *Scott v.*
 9 *Breeland*, 792 F.2d 925 (9th Cir. 1986). When a defendant moves to dismiss for lack of personal
 10 jurisdiction, the *plaintiff* has the burden of demonstrating that the court *has* jurisdiction over the
 11 particular defendant. *See Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d
 12 1122, 1128-29 (9th Cir. 2003). As the Ninth Circuit described in more detail in *Scott*:

14 The party seeking to invoke the court's jurisdiction bears the burden
 15 of establishing that jurisdiction exists. *Data Disc, Inc. v. Systems*
 16 *Technology Associates*, 557 F.2d 1280, 1285 (9th Cir.1977); *see*
 17 *also Cubbage v. Merchant*, 744 F.2d 665, 667 (9th Cir.1984), cert.
 18 denied, --- U.S. ---, 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985). When a
 19 defendant moves to dismiss for lack of personal jurisdiction, the
 20 plaintiff is "obligated to come forward with facts, by affidavit or
 21 otherwise, supporting personal jurisdiction." *Amba Marketing*
 22 *Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784, 787 (9th
 23 Cir.1977).

24 *Scott*, 792 F.2d at 927.

25 Even though the burden of establishing jurisdiction is on Plaintiff, the matters alleged by
 26 the Complaint and its attachments, together with the declarations by Mr. Van Cleave and Mr.
 27 Snyder, demonstrate beyond doubt that there is no personal jurisdiction over any of the
 28 defendants in this case. Defendants have identified no ties to Nevada by VCDL, Mr. Van Cleave,
 or Mr. Snyder other than the allegations relating to this supposed infringement, which are

1 insufficient to establish personal jurisdiction under the specific Ninth Circuit law applicable to
 2 this fact pattern.

3 Defendants are aware of several decisions by judges of this Court upholding personal
 4 jurisdiction over out of state defendants in infringement cases brought by Righthaven. *See, e.g.,*
 5 *Righthaven, LLC v. Dr. Shezad Malik Law Firm, P.C.*, No. 2:10-cv-0636-RLH-RJJ (order filed
 6 9/2/10); *Righthaven, LLC v. Industrial Wind Action Corp.*, No. 2:10-cv-601-RLH-PAL (order
 7 filed 9/24/10); *Righthaven LLC v. MajorWager.Com, Inc.*, No. 2:10-cv-00484-GMN-LRL (order
 8 filed 10/28/10). However, these decisions rely principally on an older and factually different
 9 Ninth Circuit case, *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*,
 10 106 F.3d 284 (9th Cir. 1997), that has been superseded by more recent authority specifically
 11 relating to allegedly infringing “passive websites,” as in the case at bar. In those more recent
 12 cases, the Ninth Circuit has held that the mere fact that the infringement occurs with respect to
 13 copyrighted or trademarked material produced or located within the forum, occurrence of the
 14 injury to a plaintiff within the forum, and knowledge that the plaintiff and injury are within the
 15 forum state, is *not* sufficient to sustain personal jurisdiction. *See Brayton Purcell LLP v.*
 16 *Recordon & Recordon*, 606 F.3d 1124 (9th Cir. 2010) (superseding the withdrawn opinion in
 17 same case reported at 575 F.3d 981(9th Cir. 2009); *Pebble Beach Co. v. Caddy*, 453 F.3d 1151
 18 (9th Cir. 2006); *see also Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082 (9th Cir.
 19 2000).⁴

20 For courts to have “general jurisdiction” over a non-resident of the forum, the plaintiff
 21 must show that the defendant has engaged in "continuous and systematic general business
 22

23
 24
 25
 26 ⁴ In the three cases brought by Righthaven cited above in which judges of this District have upheld personal
 27 jurisdiction over out of state defendants, it does not appear that the parties brought this newer, more specific authority
 28 squarely to the attention of the Court. Briefing filed by defendants in those three cases seems to cite *Brayton Purcell*
 and *Pebble Beach* either not at all, sporadically, or largely for different propositions. Certainly, none of the opinions
 in those three cases relied on these more recent and specific Ninth Circuit cases.

contacts," *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984), that "approximate physical presence" in the forum state. *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). There are no allegations in the Complaint that would support a finding that any of these defendants have continuous, systematic general business contacts that approximate a physical presence within Nevada. The declarations of Mr. Van Cleave and Mr. Snyder demonstrate that there are virtually no contacts at all, and none that would even come close to satisfying this test. *See* Exhibits A and B hereto.

Alternatively, "specific jurisdiction" may sometimes be found based on the acts giving rise to the suit. Because Nevada has a long arm statute (Nev. Rev. Stat. § 14.065) that exercises personal jurisdiction to the extent permitted by due process, the Ninth Circuit has applied a three part test to determine if defendants have sufficient contacts with the forum state to be haled into its courts. The plaintiff must demonstrate that:

- (1) the defendant has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum, (2) the claim arises out of or results from the defendant's forum-related activities, and (3) the exercise of jurisdiction is reasonable.

Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000).

With regard to the first prong, the Ninth Circuit has refined the test to be whether the defendant has either (1) "purposefully availed" himself of the privilege of conducting activities in the forum, or (2) "purposefully directed" his activities toward the forum. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). As the Ninth Circuit noted in *Schwarzenegger*, "availment and direction are, in fact, two distinct concepts. A purposeful availment analysis is most often used in suits sounding in contract. A purposeful direction analysis, on the other hand, is most often used in suits sounding in tort." *Id.* Where copyright is

1 the underlying issue, “purposeful direction” is the “proper analytical framework.” *Brayton*
 2 *Purcell*, 606 F.3d at 1128.

3 To determine whether a defendant has “purposefully directed” his conduct or actions
 4 toward the forum state, a further three part test is employed. In recent cases employing that three
 5 part test, the Ninth Circuit has emphasized that “express aiming” is necessary to support personal
 6 jurisdiction, and that operating a passive website that may infringe on a trademark or copyrighted
 7 material within the forum state is not sufficient, even if it causes foreseeable harm to a plaintiff
 8 there who holds the intellectual property rights. As the Court stated in *Pebble Beach*:

10 In *Calder v. Jones*, the Supreme Court held that a foreign act that is
 11 both aimed at and has effect in the forum satisfies the first prong of
 12 the specific jurisdiction analysis. 465 U.S. 783, 104 S.Ct. 1482, 79
 13 L.Ed.2d 804 (1984). We have commonly referred to this holding as
 14 the “Calder effects test.” *See, e.g., Bancroft*, 223 F.3d at 1087. To
 15 satisfy this test the defendant “must have (1) committed an
 16 intentional act, which was (2) expressly aimed at the forum state,
 17 and (3) caused harm, the brunt of which is suffered and which the
 18 defendant knows is likely to be suffered in the forum state.” *Id.* at
 19 1088 (*citing Panavision Int’l v. Toeppen*, 141 F.3d 1316, 1321 (9th
 20 Cir.1998)). However, referring to the *Calder* test as an “effects” test
 21 can be misleading. For this reason, we have warned courts not to
 22 focus too narrowly on the test’s third prong - the effects prong -
 23 holding that “something more” is needed in addition to a mere
 24 foreseeable effect. *Bancroft*, 223 F.3d at 1087. Specifically we have
 25 stated,

26 “Subsequent cases have struggled somewhat with *Calder*’s
 27 import, recognizing that the case cannot stand for the broad
 28 proposition that a foreign act with foreseeable effects in the forum
 state will always give rise to specific jurisdiction. We have said that
 there must be ‘something more’. . . . We now conclude that
 ‘something more’ is what the Supreme Court described as ‘express
 aiming’ at the forum state.”

22 *Pebble Beach*, 453 F.3d at 1156 (quoting *Bancroft*, 223 F.3d at 1087). In *Pebble Beach*, the
 23 Court held that allegedly infringing activity on a passive website outside the forum jurisdiction,
 24 even if the Defendant may have known that it would cause harm to a trademark employed within
 25 the forum state by a resident of that state, is not enough to conclude that personal jurisdiction is
 26 proper.

28 ///

1 The Court stated, 453 F.3d at 1156:

2 We conclude that Caddy's actions were not expressly aimed at
3 California. The only acts identified by Pebble Beach as being
4 directed at California are the website and the use of the name
5 "Pebble Beach" in the domain name. These acts were not aimed at
6 California and, regardless of foreseeable effect, are insufficient to
7 establish jurisdiction.

8 In support of its contention that Caddy has expressly aimed conduct
9 at California, Pebble Beach identifies a list of cases where we have
10 found that a defendant's actions have been expressly aimed at the
11 forum state sufficient to establish jurisdiction over the defendant.
12 Pebble Beach asserts that these cases show that Caddy's website
13 and domain name, coupled by his knowledge of the golf resort as a
14 result of his working in California, are sufficient to satisfy the
15 express aiming standard that it is required to meet. We disagree. If
16 anything, these cases establish that "something more" - the express
17 aiming requirement - has not been met by Pebble Beach.

18 In the case at bar, Plaintiff's allegations are exactly similar to the allegations in *Pebble*
19 *Beach*: 1) existence of the allegedly infringing material on a website; 2) imputed knowledge that
20 the Las Vegas Review Journal is located in Nevada and that the infringed material had its source
21 there; and 3) foreseeable harm in Nevada. *Pebble Beach* found these allegations to be insufficient
22 to support express aiming.

23 In *Brayton Purcell*, the Ninth Circuit made it crystal clear that copied materials posted on
24 a website by a non-resident defendant, that allegedly infringed on the copyright held by the
25 plaintiff in materials posted on plaintiff's own website in the forum district in which the plaintiff
26 resided, would not suffice to confer personal jurisdiction over the non-resident. *Brayton Purcell*
27 was a venue case, but the court analyzed the venue issue under the principle that, pursuant to 28
29 U.S.C. § 1400(a), venue is proper in "any judicial district in which the defendant would be
30 amenable to personal jurisdiction if the district were a separate state." *Brayton Purcell*, 606 F.3d
31 at 1128. Thus, it examined whether the Northern District of California would have personal
32 jurisdiction over defendants who were residents of the Southern District of California, if those
33 districts were two separate states.

1 The Court emphatically held that maintenance of a website that allegedly infringed on
 2 copyrighted materials whose source was the forum district and in which the copyright holder
 3 resided did not satisfy the “express aiming” requirement. It stated:

4 The second part of the *Calder*-effects test requires that the
 5 defendant's conduct be expressly aimed at the forum. *See Pebble*
 6 *Beach*, 453 F.3d at 1156. This Court has emphasized that
 7 “‘something more’ than mere foreseeability [is required] in order to
 8 justify the assertion of personal jurisdiction,” *Schwarzenegger*, 374
 9 F.3d at 805, and that “‘something more’ means conduct expressly
 10 aimed at the forum, *see Pebble Beach*, 453 F.3d at 1156 (“We now
 11 conclude that ‘something more’ is what the Supreme Court
 12 described as ‘express aiming’ at the forum state.”) (quoting
 13 *Bancroft*, 223 F.3d at 1087).

14 ***It is beyond dispute in this circuit that maintenance of a***
 15 ***passive website alone cannot satisfy the express aiming prong. See***
 16 ***Holland Am. Line Inc. v. Wartsila N. Am., Inc.***, 485 F.3d 450, 460
 17 (9th Cir. 2007) (“We consistently have held that a mere web
 18 presence is insufficient to establish personal jurisdiction.”); *Pebble*
 19 *Beach*, 453 F.3d at 1158 (“[W]e reject . . . any contention that a
 20 passive website constitutes express[] aiming.”). (emphasis added)

21 *Brayton Purcell*, 606 F. 3d at 1129.

22 Although the Court ultimately found that personal jurisdiction in the Northern District
 23 would be proper in *Brayton Purcell*, it was only because the defendants made “commercial use of
 24 Brayton Purcell's copyrighted material for the purpose of competing with Brayton Purcell for
 25 elder abuse clients” within the forum district. *Brayton Purcell*, 606 F. 3d at 1129.

26 There is no similar conduct in the case at bar. The VCDL website in the case at bar is, in
 27 all respects pertinent here, a passive website. None of the defendants used it for commercial
 28 purposes to compete for business or clients within Nevada, as in *Brayton Purcell*. Instead, it was
 used for educational activities directed principally at VCDL members, none of whom are Nevada
 residents, and almost all of whom are Virginia residents.

As noted, Mr. Van Cleave did not copy the article from the Las Vegas Review Journal's
 website. Van Cleave Decl. ¶ 8. Instead, as shown by the material posted, and Mr. Van Cleave's
 Declaration, the link to the article was emailed to him by another individual. Van Cleave Decl. ¶

8; Cplt. Ex. 2, p. 13 of 27. Similarly, Mr. Snyder did not take any action directed at Nevada with respect to this article and, in fact, did not take any action at all regarding it. Snyder Decl. ¶ 3. The Complaint alleges no conduct expressly aimed at Nevada by any defendant in this case. As *Brayton Purcell* and *Pebble Beach* make clear, an alleged infringement by persons outside the forum on a passive website, even though it may involve intellectual property created within, or an intellectual property holder within, the forum, is not sufficient to confer personal jurisdiction. Accordingly, this case must be dismissed.

II. THE CASE MUST BE DISMISSED BECAUSE THE COMPLAINT FAILS TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED.

The Complaint does not state a claim on which relief can be granted as to all defendants, and for additional reasons as to Mr. Snyder.

A. The Complaint does not state a claim as to any of the defendants.

First, the Complaint does not indicate that Righthaven has standing to bring this case. Although it alleges that Righthaven is the owner of the copyright to the article, the Complaint states on its face that the article was originally published on or about July 12, 2010, and that the alleged infringement took place on or about July 22, 2010. However, the registration of the copyright did not occur until September 9, 2010.

As this Court has stated:

“A plaintiff who claims copyright infringement must show: (1) ownership of a valid copyright; and (2) that the defendant violated the copyright owner’s exclusive rights under the Copyright Act.” *Ellison v. Robertson*, 357 F.3d 1072, 1077 (9th Cir. 2004), *see Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). “[O]nly the owner of an exclusive right under the copyright act is entitled to sue for infringement.” *Silvers v. Sony Pictures Entm’t Inc.*, 402 F.3d 881, 889 (9th Cir. 2005). The Ninth Circuit held in *Silvers* that an assignor can transfer the ownership interest in an accrued past infringement, but the assignee only has standing to sue if the interest in the past infringement is expressly included in the assignment and the assignee also owns the actual copyrights. *Id.* at

890 (aligning the Ninth Circuit with the Second Circuit as expressed in *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971 (2nd Cir. 1991)).

Righthaven LLC v. MajorWager.Com, Inc. No. 2:10-cv-00484-GMN-LRL (order filed 10/28/10 at 3).

In the case at bar, there is no allegation in the Complaint that Righthaven, as assignee, has standing to sue for an alleged infringement that took place prior to transfer and registration of the copyright.

Second, although the Complaint alleges that Mr. Van Cleave posted an “unauthorized copy” of the article, and states that the Defendants were not granted permission to reproduce the work, the copy of the Las Vegas Review Journal website article appearing as Exhibit 1 to the Complaint, has buttons expressly inviting visitors to the website to “email this,” to “save this” (make an electronic copy), and to print it. By inviting readers to email the article, and to copy it electronically, either express or implied permission was given to reproduce it. As noted, Mr. Van Cleave received an emailed link to the article. Van Cleave Decl. ¶ 8. A copyright holder should not be suffered to invite emailing and copying by including buttons on its website to do so, and then sue organizations and individuals who have taken them up on their offer. Certainly, such an invitation negates any allegation of “willful” infringement. Cplt. ¶¶ 40-42.

Third, this alleged infringement by VCDL is protected by the doctrine of fair use. This Court has recently granted a motion to dismiss in a Righthaven case on grounds of fair use. *Righthaven LLC v. Realty One Group, Inc.*, Case No. 2:10-cv-1036-LRH-PAL (order dated October 18, 2010; filed October 19, 2010). In that case, a website blog (as in the instant case) had reproduced part of a Las Vegas Review Journal article. Although the facts in that case were somewhat different from the case at bar, the doctrine of fair use is equally applicable.

///

1 The doctrine of fair use is codified at 17 U.S.C. §107, which provides, in relevant part:

2 Notwithstanding the provisions of sections 106 and 106A, the fair
3 use of a copyrighted work, including such use by reproduction in
4 copies...or by any other means specified by that section, for
5 purposes such as criticism, comment, news reporting, teaching
6 (including multiple copies for classroom use), scholarship, or
7 research, is not an infringement of copyright. In determining
8 whether the use made of a work in any particular case is a fair use
9 the factors to be considered shall include--

10 (1) the purpose and character of the use, including whether such use
11 is of a commercial nature or is for nonprofit educational purposes;

12 (2) the nature of the copyrighted work;

13 (3) the amount and substantiality of the portion used in relation to
14 the copyrighted work as a whole; and

15 (4) the effect of the use upon the potential market for or value of the
16 copyrighted work.

17 The four factors are not treated in isolation, but must be weighed together. *Campbell v. Acuff-*
18 *Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

19 Regarding the first factor, it is apparent from the status of VCDL as a non-profit, §501(c)4
20 organization, and the inclusion of the article as part of a series of materials directed at VCDL
21 members in Virginia, that the use of the material was for non-profit educational purposes relating
22 to the members' concerns as gun owners and those who may legally carry firearms. There is no
23 allegation in the Complaint that the article was ever commercially distributed for profit or gain.
24 In fact, VCDL's non-profit status requires that its net earnings be devoted "exclusively to
25 charitable, educational, or recreational purposes." 26 U.S.C. § 501(c)(4).

26 In addition, the alleged use by VCDL was transformative. As part of the materials
27 reproduced in Exhibit 2 to the Complaint, two links to the Las Vegas Review Journal website
28 were provided. The first link, to lvrj.com, is a link to the main page of the Las Vegas Review
Journal, identifying the source of the article. The second link, a "tinyurl" link, is a compressed
link that pointed to the specific article on the Las Vegas Review Journal website. Thus, provision

1 of these links was transformative, changing the material from not just being a news article, but
2 also acting as a “pointer” to the Las Vegas Review Journal’s website, and directing internet traffic
3 there. *See Perfect 10, Inc. v. Amazon.com, Inc.* 508 F.3d 1146, 1165-66 (9th Cir. 2007).

4 The second factor also weighs in favor of a finding of fair use. The nature of this article
5 was a news report. As this court noted in the *Realty One* case, the article contained “factual news
6 reporting...which supports [defendant’s] fair use of the copyrighted information. *See e.g., Los*
7 *Angeles News Service v. CBS Broadcasting, Inc.*, 305 F.3d 924 (9th Cir. 2002) (re-publication of
8 a video depicting a news report was a fair use because it was informational rather than creative).”
9 *Realty One* at 3.

11 It is also significant, and supports fair use, that the news report had already appeared on
12 the internet approximately ten days before the alleged re-posting on vcdl.org. Works that haven’t
13 yet been published are subject to greater protection, but published works are more likely to
14 qualify as fair use because the first public appearance of the expression has already occurred.
15 *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564 (1985).

17 Regarding the third factor, the allegation in this case is that the entire article was
18 reproduced rather than just a portion. Although *Realty One* involved only a portion of the article,
19 it was the “news report” portion that was reproduced, and the commentary (that is, the creative
20 portion that would receive greater protection) that was omitted. The Court therefore
21 appropriately found that reproduction of the news portion was protected by fair use. Further, as
22 noted above, the website version of the Las Vegas Review Journal article invited readers to copy
23 the entire article by printing or saving it electronically, and also invited readers to “email this.”
24 Cplt. Ex. 1. It should come as no surprise that the entire article was apparently reproduced, and
25 not just a portion. In addition, the article was short, and it would have made little sense to
26 reproduce only a small portion of it.
27
28

1 The fourth factor also weighs strongly in favor of a finding of fair use. The “potential
2 market for or value of the copyrighted work” would be affected insignificantly, if at all, by the
3 alleged reproduction in this case. This was a topical news story, not a novel, movie, or musical
4 recording that could be expected to have enduring value or generate sales over time. In fact, the
5 chances that there would even be a “market” for this work by itself, after initial publication, are
6 minimal. In addition, the Complaint alleges that the alleged infringement did not occur until ten
7 days after publication. By that time, this news was, for most people, “yesterday’s news.”

9 Further, any distribution by VCDL of the article was not for its current news value. It is
10 not in the newspaper business. Instead, VCDL is an educational organization, and the purpose
11 here was clearly to inform members about the dangers that can be faced by those who legally
12 carry concealed firearms, and to present a cautionary example. Any distribution in this fashion
13 would not change the market or value of the article to Righthaven, if any. In fact, it is unclear
14 that Righthaven uses the articles to which it acquires copyrights for any marketable purpose at all,
15 but instead apparently uses those rights simply to bring lawsuits.

17 Thus, as in *Realty One*, this case should be dismissed because, under the doctrine of fair
18 use, there has been no infringement of copyright by any defendant.

19 **B. The Complaint does not allege any infringement by Mr. Snyder individually.**

20 The Complaint does not state a claim against any of the defendants, including Mr. Snyder,
21 for the reasons discussed above. However, the Complaint also does not state a claim against Mr.
22 Snyder because it fails to describe any act of alleged wrongdoing by him.

23 As to Mr. Snyder, the Complaint alleges only that he is identified on the Website as the
24 Vice -President of VCDL, and that (in addition to VCDL as an organization) he is identified as a
25 registrant and administrative contact by Tucows for the domain. Cptl. ¶¶ 6, 7. Plainly, an
26 organization must work through its officers and employees. Even assuming (without admitting)
27
28

1 that there was an actionable infringement in this case, that does not make Mr. Snyder, as Vice-
2 President of VCDL and acting as a contact with a domain registrar, personally liable for any such
3 infringement.

4 There is no allegation that Mr. Snyder participated in any infringing activity; that he was
5 aware of any infringing activity; that it was within his power, ability, and responsibility as a
6 corporate officer to oversee and control the contents of the website; or that he was vicariously
7 liable for the acts of another. It is unnecessary to go through any and all legal theories under
8 which liability might be asserted against a corporate officer, because the Complaint alleges
9 neither a legal theory nor any facts whatsoever to hold Mr. Snyder liable.

11 The only allegation is that “Mr. Snyder has willfully engaged in the copyright
12 infringement of the work,” without stating any facts to support that conclusory allegation. The
13 United States Supreme Court has recently held that such allegations consisting of legal
14 conclusions are insufficient to state a claim that will survive a motion to dismiss. The United
15 States Supreme Court has issued two recent cases holding that allegations consisting of legal
16 conclusions are insufficient to state a claim that will survive a motion to dismiss, and that facts
17 sufficient to support liability must be pled. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007);
18 *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

20 In *Iqbal*, 129 S.Ct. at 1949, the Court affirmed a dismissal for failure to state a claim,
21 holding that:

23 the tenet that a court must accept as true all of the allegations
24 contained in a complaint is inapplicable to legal conclusions.
25 Threadbare recitals of the elements of a cause of action, supported
by mere conclusory statements, do not suffice. (citing *Twombly*).

26 The Court noted that: “While legal conclusions can provide the framework of a complaint, they
27 must be supported by factual allegations.” *Iqbal*, 129 S.Ct. at 1950. “A pleading that offers
28

1 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not
 2 do.'... Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual
 3 enhancement.'" *Iqbal*, 129 S.Ct. at 1949 (citations to *Twombly* omitted).

4 Regarding Mr. Snyder, the Complaint alleges only the legal conclusion that he "willfully
 5 engaged in the copyright infringement of the work," without any facts to support that conclusion.
 6 Such an allegation does not state a claim as to which relief can be granted, under the standards
 7 enunciated in *Twombly* and *Iqbar*.
 8

9 CONCLUSION

10 For the foregoing reasons, the Complaint must be dismissed for lack of personal
 11 jurisdiction and failure to state a claim on which relief can be granted.

12 DATED: November 19, 2010.

13 Respectfully submitted,
 14

15
 16 /s/ Robert DeLong
 17 Richard E. Gardiner (Pro Hac Vice to be submitted)
 18 Attorney at Law
 19 DAN M. PETERSON PLLC
 20 Dan M. Peterson (Pro Hac Vice to be submitted)
 21 3925 Chain Bridge Road, Suite 403
 22 Fairfax, VA 22030
 23 Tel: (703) 352-7276
 24 Fax: (703) 359-0938
 25 Email: regardiner@cox.net
 26 Email: dan@danpetersonlaw.com

27 -and-

28 PARSONS, BEHLE & LATIMER
 Robert W. DeLong, NV Bar No. 10022
 50 W. Liberty Street, Suite 750
 Reno, Nevada 89501
 Tel: (775) 323-1601
 Fax: (775) 348-7250
 Email: rdelong@parsonsbehle.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Parsons Behle & Latimer, and that on the 19th day of November, 2010, I filed a true and correct copy of the foregoing DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED.R.CIV.P. RULES 12 (b)(2) and 12(b)(6) with the Clerk of the Court using the Court's CM/ECF system, which sent electronic notification to all registered users as follows:

J. Charles Coons, Esq.
Joseph C. Chu, Esq.
Righthaven LLC
9960 W. Cheyenne Avenue, Suite 210
Las Vegas, Nevada 89129

/s/ Tracy L. Brown
Employee of Parsons Behle & Latimer